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FILED

DEC 18 2006

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA1 UNITED STATES BANKRUPTCY COURT  
2 EASTERN DISTRICT OF CALIFORNIA  
34 In re: ) Case No. 04-28375-D-13L  
5 KEVIN HEALY, ) Docket Control No. KMH-1  
6 ) Date: November 28, 2006  
7 Debtor. ) Time: 2:00 p.m.  
 ) Dept: D  
-----8 MEMORANDUM DECISION9 On November 8, 2006, Kevin M. Healy (the "Debtor") filed a  
10 Motion Re: Judicial Disqualification (the "Motion") to request  
11 the disqualification of the undersigned bankruptcy judge.

12 For the reasons set forth below, the Motion will be denied.

13 I. INTRODUCTION14 The record in this case indicates that on August 16, 2004,  
15 the Debtor filed a petition for chapter 13 relief. At that time,  
16 the Debtor was represented by Peter Macaluso ("Counsel").<sup>1</sup> The  
17 case was initially assigned to Department "A" of this court, the  
18 Honorable Michael McManus presiding. Lawrence Loheit (the  
19 "Trustee") was designated as the chapter 13 trustee for the  
20 Debtor's case.21 On October 30, 2004, after two objections to confirmation  
22 and a relief-from-stay motion had been filed in the Debtor's  
23 case, the case was reassigned to the Honorable Thomas Holman.  
24 Judge Holman heard these matters, and, on January 5, 2005, Judge  
25 Holman also heard the Trustee's motion to dismiss the Debtor's  
26 chapter 13 case. The court granted the Trustee's motion, and on  
2728 1. As of Dec. 15, 2006, the court's docket continues to  
indicate that Mr. Macaluso is the Debtor's attorney of record in this  
case.

1 January 14, 2005 entered an order, signed by Judge Holman, that  
2 dismissed the case.

3 On April 28, 2005, the Trustee filed his Final Report and  
4 Account (the "Report") for the Debtor's case. The Trustee  
5 reported the disposition of the sum of \$960 that had been paid by  
6 the Debtor into his chapter 13 plan before the case was  
7 dismissed. According to the Report, \$710 had been paid to  
8 Counsel and \$250 had been paid to the Trustee as compensation to  
9 each party for services in the Debtor's case.

10 On May 31, 2005, the Debtor filed a Notice of Objection to  
11 Disbursement of Attorney Fees; Request for Hearing (the  
12 "Objection"). The Objection went solely to the disbursement of  
13 the \$710 to Counsel, as set forth in the Report. In response to  
14 the Objection, the Trustee set the matter for a hearing on August  
15 2, 2005. Meanwhile, on July 6, 2005, the undersigned was  
16 assigned as the judge in the Debtor's case, in place of Judge  
17 Holman.

18 At the August 2, 2005 hearing, the court set a briefing  
19 schedule for the Objection, and the parties thereafter filed  
20 pleadings in support of their respective positions. Although  
21 Counsel initially filed pleadings in regard to the Objection,  
22 attorney Paul J. Pascuzzi, of Felderstein Fitzgerald Willoughby &  
23 Pascuzzi LLP (the "Felderstein Firm"), appeared on Counsel's  
24 behalf in papers filed on August 29, 2005.

25 After oral argument at the hearing on September 20, 2005,  
26 the court took the matter of the Objection under submission. The  
27 court later filed a Memorandum Decision, and entered an order on  
28 September 21, 2005 (the "Order") overruling the Objection.

1 On September 30, 2005, the Debtor filed a Notice of Appeal  
2 in regard to the Order. On September 22, 2006, this court  
3 received from the Bankruptcy Appellate Panel of the Ninth Circuit  
4 ("Panel") a memorandum disposition of the Debtor's appeal, and on  
5 October 11, 2006, this court received a copy of the Panel's  
6 judgment that vacated the Order and remanded the matter for  
7 further proceedings consistent with the Panel's memorandum.

8 On September 28, 2006, Counsel filed with this court a  
9 motion to set procedures on remand. On November 14, 2006, the  
10 Debtor filed opposition to Counsel's motion to set procedures.  
11 The hearing on Counsel's motion has been continued so that the  
12 Debtor's request for disqualification can be resolved first.

13 As noted above, the Debtor also filed the Motion, on  
14 November 8, 2006, about one month after Counsel requested  
15 scheduling of the Objection on remand. In the Motion, the Debtor  
16 requests that the undersigned be disqualified "from this matter,"  
17 without describing specifically the matter from which the  
18 undersigned's disqualification is sought. The chapter 13 case  
19 has been dismissed, and the only pending matters on the docket  
20 are (a) the Objection and (b) the Motion (which will be resolved  
21 by way of the order described in this Memorandum). Given that  
22 the Objection is the only matter likely to require resolution in  
23 any event, the court will simply construe the Motion to request  
24 the undersigned's disqualification from the Debtor's case.

## II. ANALYSIS

26 This court has jurisdiction over the Motion pursuant to 28  
27 U.S.C. sections 1334 and 157(b)(1). The Motion is a core  
28 / / /

1 proceeding under 28 U.S.C. section (b) (2) (A) & (0); In re Betts,  
2 143 B.R. 1016, 1018 (Bankr. N.D. Ill. 1992).

3 "A bankruptcy judge shall be governed by 28 U.S.C. § 455,  
4 and disqualified from presiding over the proceeding or contested  
5 matter in which the disqualifying circumstances arises, or, if  
6 appropriate, shall be disqualified from presiding over the case."  
7 Fed. R. Bankr. P. 5004(a). Lacking any procedure for reference  
8 of the matter to another judge, motions to disqualify are heard  
9 by the judge sitting in the case. In re Bernard, 31 F.3d 842,  
10 843 (9th Cir. 1994).

11 Section 455 of Title 28 provides in part as follows:

12 (a) Any justice, judge, or magistrate of the United  
13 States shall disqualify himself in any proceeding in  
which his impartiality might reasonably be questioned.

14 (b) He shall also disqualify himself in the following  
15 circumstances:

16 (1) Where he has a personal bias or prejudice  
17 concerning a party, or personal knowledge of  
disputed evidentiary facts concerning the  
proceeding.

18 \* \* \*

19 (4) He knows that he . . . has a financial  
20 interest in the subject matter in controversy or  
in a party to the proceeding, or any other  
21 interest that could be substantially affected by  
the outcome of the proceeding.

22 The disqualification statute was comprehensively revised in  
23 1974, to provide for disqualification not only where a judge  
24 holds a personal bias or prejudice, but also to spell out a list  
25 (not fully reproduced above) of various interests and  
26 relationships that require the judge to disqualify himself from  
27 hearing a proceeding; such interests and relationships were only  
28 generally stated in the prior statutory language. Liteky v.

1       United States, 510 U.S. 540, 546-48 (1994). Section 455(a) was  
2       added to include objective, "catch-all" grounds for  
3       disqualification, in addition to the earlier "interest or  
4       relationship" grounds and "bias or prejudice" grounds, which are  
5       now specifically stated and set forth in the various subsections  
6       making up § 455(b). Liteky, 510 U.S. at 548. Under § 455(a),  
7       "[the standard for recusal is clearly objective: 'whether a  
8       reasonable person with knowledge of all of the facts would  
9       conclude that the judge's impartiality might reasonably be  
10       questioned'." In re Georgetown Park Apts., Ltd., 143 B.R. 557,  
11       559 (B.A.P. 9th Cir. 1992), quoting United States v. Nelson, 718  
12       F.2d 315, 321 (9th Cir. 1983) (other citations omitted).

13       The Code of Conduct for United States Judges (the "Code of  
14       Conduct") mirrors the provisions of 28 U.S.C. § 455. The Code  
15       of Conduct requires that "every judicial officer must satisfy  
16       himself that he is actually unbiased towards the parties in each  
17       case and that his impartiality is not reasonably subject to  
18       question." Bernard, 31 F.3d at 843. Under this standard, the  
19       judge must not only be subjectively confident that he is  
20       unbiased; it is also objectively necessary that "an informed,  
21       rational, objective observer would not doubt his impartiality."  
22       Id. at 844, citing United States v. Winston, 613 F.2d 221, 222  
23       (9th Cir. 1980). However, "to say that § 455(a) requires concern  
24       for appearances is not to say that it requires concern for  
25       mirages." United States v. El-Gabrowny, 844 F. Supp. 955, 961  
26       (S.D.N.Y. 1994). As such, recusal must be based on factors in  
27       the record and in the law. Id. at 962.

28       / / /

1       Cases applying recusal statutes apply a presumption of  
 2 impartiality. E.g. In re Larson, 43 F.3d 410, 414 (8th Cir.  
 3 1994) (judge presumed impartial; parties seeking recusal bear  
 4 "substantial burden" of proving otherwise); First Interstate Bank  
 5 v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th Cir. 2000)  
 6 ("Judicial impartiality is presumed"); In re Spiratos, 298 B.R.  
 7 425, 431 (Bankr. C.D. Cal. 2003) ("A judge is presumed to be  
 8 qualified to hear a matter and the burden is upon the moving  
 9 party to prove otherwise").

10       In addition, "Judges have an obligation to litigants and  
 11 their colleagues not to remove themselves needlessly . . .  
 12 because a change of umpire in mid-contest may require a great  
 13 deal of work to be redone . . . and facilitate judge-shopping."  
 14 In re Betts, 143 B.R. 1016, 1020 (Bankr. N.D. Ill. 1992), quoting  
 15 In re National Union Fire Ins. Co., 839 F.2d 1226, 1229 (7th Cir.  
 16 1988) (omitting citation); see also In re Computer Dynamics,  
 17 Inc., 253 B.R. 693, 698 (E.D. Va. 2000) (judge equally obligated  
 18 not to remove himself when there is no necessity and to do so  
 19 when there is), aff'd 10 F. App'x 141 (4th Cir. 2001).

20       Finally, in the Ninth Circuit, recusal issues must be raised  
 21 "at the earliest possible time" after facts supporting a recusal  
 22 request are discovered. First Interstate, 210 F.3d at 988 n.8  
 23 (citations omitted); see also Spiratos, 298 B.R. at 434  
 24 (discussing Ninth Circuit cases requiring prompt filing of  
 25 recusal motion to prevent wasted resources and judge-shopping);  
 26 but see In re Cooke, 160 B.R. 701, 705 (Bankr. D. Conn. 1993)  
 27 (even untimely challenge to partiality should be addressed).

28 / / /

1       In the Motion, the Debtor advances three grounds for  
 2 disqualification, each of which is discussed below. In  
 3 opposition, Counsel argues generally that the Debtor has failed  
 4 to demonstrate grounds for disqualification.<sup>2</sup>

5       The Debtor's first ground for disqualification is the  
 6 following: "at the time of the September 2005 oral argument [on  
 7 the Objection], [Judge Bardwil] reportedly had and was continuing  
 8 to have undisclosed business dealings with either Mr. Pascuzzi or  
 9 other partners in [the Felderstein Firm]." Motion at 2. In the  
 10 Motion, these "business dealings" are alleged to be based on the  
 11 undersigned's participation as a panelist for a continuing legal  
 12 education course in October 2005, for which Mr. Felderstein, a  
 13 partner or shareholder in the Felderstein Firm, also participated  
 14 as a panelist.

15       At oral argument, the Debtor acknowledged that the Motion is  
 16 supported by no evidence of a business relationship between the  
 17 undersigned and any member of the Felderstein Firm, which might  
 18 provide a basis for disqualification under 28 U.S.C. § 455(b)(4).  
 19 There is in fact no such relationship. Rather, the Debtor argues  
 20 that an appearance of impropriety exists because:

21 / / /

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22  
 23       2. Counsel also argues that the Motion should be denied as  
 24 untimely under a four-part test described in *Spirtos*, 298 B.R. at  
 25 434. This court, during the time the Debtor's appeal was pending,  
 26 retained jurisdiction of the Debtor's bankruptcy case and any  
 27 proceeding therein other than the Objection (and thus the Debtor  
 28 could have requested the undersigned's disqualification from the case  
 earlier). But the Motion was nonetheless timely due to satisfaction  
 of the test. Because the Debtor's case has been dismissed, recusal  
 at this stage would not require use of a great deal of judicial  
 resources, since for a new judge few issues would remain; and the  
 Debtor's reason for the delay, that he did not know the outcome of  
 his appeal, is reasonable and shows good cause.

1 there is a public record (advertisements) that the  
2 judge and the attorneys are still working together  
3 outside of court dealing with this subject of  
bankruptcy and for financial gain -- especially when  
the Court does not disclose this fact before hearing  
[t]he matter.

4 Motion at 3-4.

5  
6 It is common knowledge, of course, that judges regularly  
7 appear on panels and at presentations for members of the bar, and  
8 that such events are regularly advertised in various publications  
9 that might be viewed by both the public and the bar. But it is  
10 not reasonable to conclude that the participation of a judge with  
11 members of the bar who appear before the judge's court would  
12 create a predisposition, or an appearance of a predisposition, to  
13 favor the members of the bar who participate over those who do  
14 not. The Debtor's assertion of an appearance of impropriety is  
15 undermined by Canon 4 of the Code of Conduct, which not only  
16 permits judges to participate in such activities, but encourages  
17 judges to do so. See Code of Conduct for U.S. Judges, Commentary  
18 to Canon 4 (2002) (participation encouraged so that judicial  
19 officers might contribute to the improvement of the law). By  
20 itself, then, the undersigned's participation in the educational  
21 program is not sufficient to create a reasonable question of the  
22 undersigned's impartiality.

23 The second ground advanced by the Debtor for  
24 disqualification is that the undersigned ruled against the Debtor  
25 on the Objection and that the ruling was later reversed by the  
26 Panel. The cases, however, are uniform that a "judge's adverse  
27 rulings in the course of a judicial proceeding almost never  
28 constitute a valid basis for disqualification based on bias or

1 partiality." 12 James Wm. Moore, Moore's Fed. Practice §  
 2 63.21[4], at 63-39 (3d. ed. 2006) (citing cases); see also  
 3 Liteky, 510 U.S. at 554-55 ("[J]udicial rulings alone almost  
 4 never constitute a valid basis for a bias or partiality motion").  
 5 For adverse rulings to form a basis for disqualification, there  
 6 must be a "pervasive bias" that is derived from an extrajudicial  
 7 source. 12 Moore, supra § 63.21[5]; Liteky, 510 U.S. at 550-55  
 8 (applying "extrajudicial source" doctrine arising under 28 U.S.C.  
 9 § 144 and its predecessor to revised 28 U.S.C. § 455(a)).

10 In this case, the Debtor offers no evidence of pervasive  
 11 bias from an extrajudicial source. Instead, he points only to  
 12 the prior ruling adverse to the Debtor, without any evidence to  
 13 support a contention of bias. As such, the Debtor cannot prevail  
 14 on the undersigned's prior adverse ruling as grounds for  
 15 disqualification.

16 The third ground advanced by the Debtor for disqualification  
 17 consists of statements allegedly made to him by Counsel and/or  
 18 Mr. Pascuzzi. In his declaration, the Debtor states as follows:

19 [T]hey commented that [the Debtor] should do his  
 20 "research" . . . about the work that [Counsel]'s  
 21 attorneys do with Judge Bardwil. They laughed and  
 22 stated that I should have done my homework before the  
 23 oral argument of the motion and that I didn't have a  
 24 chance.

25 [Counsel]'s comment (in front of Mr. Pascuzzi --  
 26 whom [sic] did not correct him) was: "You're a small  
 27 fish in a big pond, and only WE get to swim with the  
 28 Sharks - - you'd better drop this before you're eaten  
 alive."

Motion at 5-6 (Declaration of Debtor).

Counsel, in his declaration in support of his opposition to  
 the Motion, testifies that he "has no recollection" of making the

1 statements the Debtor attributes to him. The undersigned is  
2 troubled by Counsel's failure to directly confirm or deny making  
3 these statements, or even to provide an alternative account of  
4 what exchange, if any, occurred between the parties at the time.  
5 Without Counsel's recollection having been provided, the court  
6 takes the Debtor's testimony at face value for the purpose of  
7 deciding the Motion.

8 From the alleged statements of Counsel, the Debtor asks the  
9 court to infer an attempt by Counsel "to intimidate [the Debtor]  
10 and throw around" his alleged influence with the undersigned.  
11 Counsel's alleged statements, however, can be interpreted in many  
12 ways. A reasonable reading of the statements attributed to  
13 Counsel (no matter how ill-advised those statements may have  
14 been), that the Debtor should "do his research" about work done  
15 by members of the Felderstein Firm with the undersigned, and that  
16 "you're a small fish in a big pond," does not necessarily mean  
17 that Counsel claimed, either himself or through his attorneys, to  
18 have any influence over the undersigned. A reasonable reading of  
19 the words attributed to Counsel is that he was boasting or  
20 bragging about the effectiveness of his newly-obtained legal  
21 representation in the matter. Such a reading is reasonable in  
22 light of the fact that the undersigned's "work" with members of  
23 the Felderstein Firm in fact amounted to a mere co-appearance by  
24 the undersigned with Mr. Felderstein on a legal-education panel.

25 The Debtor's third ground for disqualification, then,  
26 amounts at best to a faint innuendo of impartiality, but nothing  
27 more. There were no facts alleged or statements made that would  
28 / / /

1 lead a reasonable person to conclude that Counsel or his attorney  
2 hold any influence over, or have an improper connection with, the  
3 undersigned. Given that mere innuendo is insufficient to  
4 overcome the presumption of impartiality, the court finds that  
5 the third ground for disqualification advanced by the Debtor is  
6 insufficient to support disqualification under 28 U.S.C. §  
7 455(a).

8 Finally, the Debtor argues that all three grounds advanced,  
9 taken together, create an objective appearance of impartiality  
10 that satisfies § 455(a). But this court disagrees. It is true  
11 that the undersigned, like all other bankruptcy judges in this  
12 judicial division, serves on various professional-education  
13 panels with members of various law firms, including the  
14 Felderstein Firm. It is also the case that the undersigned has,  
15 like at least one other bankruptcy judge previously assigned to  
16 the Debtor's case, made rulings against the Debtor. But these  
17 are facts so common to the practice of law before federal courts  
18 all over the country that they, even when added to the hazy  
19 innuendo allegedly offered by Counsel, cannot be said to create  
20 an appearance of impropriety in the mind of a reasonable person.

21 The undersigned is satisfied that he is actually unbiased  
22 towards the parties and attorneys in this matter. The  
23 undersigned also cannot conclude that the three grounds advanced  
24 by the Debtor, individually or considered together, can be said  
25 to constitute circumstances under which the impartiality of the  
26 undersigned might reasonably be questioned.

27 / / /  
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### III. CONCLUSION

2 For the reasons stated above, the court finds that Debtor  
3 has not met his burden under 28 U.S.C. § 455(a) of overcoming the  
4 presumption of impartiality and demonstrating that the  
5 impartiality of the undersigned might reasonably be questioned.  
6 Neither has the Debtor demonstrated grounds under 28 U.S.C. §  
7 455(b) for disqualification.

8 The court will issue an order consistent with this  
9 memorandum.

10 Dated: DEC 18 2006

Robert Bardwil  
ROBERT S. BARDWIL  
United States Bankruptcy Judge

**CERTIFICATE OF MAILING**

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document on today's date to each of the parties listed below:

Office of the US Trustee  
501 "I" Street, 7<sup>th</sup> Floor  
Sacramento, CA 95814

Lawrence Loheit  
P.O. Box 1858  
Sacramento, CA 95812-1852

Kevin Healy  
1405 G Street  
Sacramento, CA 95814

Peter Macaluso  
910 Florin Road, #111  
Sacramento, CA 95831-5259

Paul Pascuzzi  
Felderstein Fitzgerald Willoughby & Pascuzzi  
400 Capitol Mall, Suite 1450  
Sacramento, CA 95814

DATE: 12/18/06

Andrea Lovgren  
Deputy Clerk